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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BOBBY WILLIAMS CHUNG, Defendant and Appellant.	H033690 (Santa Clara County Super. Ct. No. EE403788)

Defendant Bobby Williams Chung appeals a judgment entered following a jury trial during which he was convicted of three counts of second degree burglary and three counts of passing a check with insufficient funds with intent to defraud (Pen. Code, §§ 459-460 subd. (b); 476(a). On appeal, defendant asserts the trial court erred in admitting evidence of his prior convictions for forgery and passing checks with insufficient funds pursuant to Evidence Code section 1101, subsection (b).

STATEMENT OF THE FACTS AND CASE

This case arises out of a series of purchases defendant made at Weirdstuff Warehouse. The first occurred on July 3, 2004, and involved defendant buying a laptop computer for $270.57. Defendant paid by check on his Bank of the West account. This check was returned to the store on July 12, 2004, and was stamped "[a]ccount closed." The second transaction occurred on July 8, 2004, and involved defendant purchasing

another laptop computer for $379.69, also paying with a check from his Bank of the West account. This check was also returned to the store, and was stamped "[a]ccount closed." After the two returned checks, a "do-not-accept" for defendant's checks was entered in Weirdstuff's database so that no further checks associated with defendant's driver's license number would be accepted.

Defendant returned to Weirdstuff Warehouse on July 17, 2004, to purchase another laptop computer. He wrote a check for $340.81 on an account at Wells Fargo Bank. The computer was bagged, and when the clerk entered the check into the system, the "do-not-accept" message popped up. The clerk did not tell defendant about the message, but did tell him to wait for a store manager. Defendant took the bag with the computer and walked out of the store. The clerk told defendant he had not received a receipt, but defendant continued to walk out the door.

The store manager and another employee confronted defendant in the parking lot. The manager said "excuse me," to defendant, and the employee told defendant he knew about the checks. Defendant rode off on his motorcycle in the direction of the manager, running over the manager's foot.

Carolyn Andrews, the account manager at Weirdstuff, attempted to contact defendant about the returned checks, but five of the six phone numbers defendant provided when he wrote the checks were disconnected. On July 19, 2004, Andrews was able to contact defendant. Defendant told Andrews that he knew there was a possibility that his checks would be returned to Weirdstuff. Andrews told defendant that the checks were all returned with "[a]ccount closed" stamped on them, and that defendant would need to make payments on the computers he purchased. Andrews sent letters to defendant for each of the checks he wrote, and used the address provided on the checks. All letters were returned.

Defendant contacted Andrews a number of times, promising to send money orders as partial payments for the computers, and promising to return the computers to the store. Andrews's last conversation with defendant was in mid-August 2004. Defendant never paid anything toward the cost of the laptops, and never returned them to the store.

Nori Fuller, a vice president at the Bank of the West, testified that at one time, defendant had three accounts with the bank. One was a business checking account that was opened on March 18, 2004. The second account was a business savings account that was opened on April 1, 2004. The checking account was closed on May 19, 2004, and the savings account was closed on May 20, 2004. Both accounts were closed by the bank due to overdraft. At the time, the checking account was overdrawn by $726.74, and the savings account was overdrawn by $99.90. Fuller testified that defendant would have received notice that his account balances were zero within three days of May 31, 2004.

Defendant's third account at Bank of the West was a personal checking account that was opened on May 3, 2004, and closed on May 18, 2004.

Check No. 1063 was written on defendant's Bank of the West business account to Weirdstuff, and was submitted to the bank for payment on July 7, 2004. The check did not post to defendant's account, because the account was closed. Check No. 1091 was also written on defendant's Bank of the West business account to Weirdstuff, and was submitted to the bank for payment on July 12, 2004. The check did not post to defendant's account, because the account was closed.

The custodian of records for Wells Fargo Back, Christina Anderson testified at trial that defendant opened a checking account in the name of Janitorial Bureau of Investigation on February 18, 2004. The account was closed by the bank on May 20, 2004, due to an overdraft of $535.20.

At trial, the prosecutor introduced evidence of defendant's prior testimony in which he stated that he signed all three checks in this case, and that he spoke to a representative at the Bank of the West about his accounts being overdrawn.

Defendant's defense at trial was that he was running a legitimate janitorial business, and that the unpaid checks to Wierdstuff were the result of sloppy and disorganized business practices.

Defendant was charged with three counts of second degree burglary (Pen. Code, §§ 459-460, subd. (b); counts one, three & five), three counts of passing a check with insufficient funds (Pen. Code, § 476a; counts two, four & six); one count of second degree robbery (Pen. Code, §§ 211-212.5; count seven); and one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count eight).

Following a second jury trial,[1] defendant was convicted of counts one through six. Defendant was found not guilty of counts seven and eight. Defendant was sentenced to six years on count one, and one year four months consecutive on counts three and five. The court stayed the terms on the remaining counts pursuant to Penal Code section 654.

DISCUSSION

Defendant asserts on the appeal that the trial court erred in admitting evidence of his prior convictions for forgery and passing checks with insufficient funds pursuant to Evidence Code section 1101.

[1] The case was originally tried in 2005, and defendant was convicted of all charges. At that time, in addition to the check fraud and second degree burglary charges, the information also included allegations of drug related offenses, including possession of narcotic paraphernalia (Health & Saf. Code, § 11364), and possession of a hypodermic syringe (Bus. & Prof. Code, § 4140). On appeal, this court reversed the judgment on the ground that the trial court erred by denying defendant's motion to sever the drug related charges from the theft crimes. (*People v. Chung* (May 18, 2007, H029551) [nonpub. opn].)

Factual Background

At the beginning of trial, defendant, proceeding in pro per, filed an in limine motion to exclude evidence of his prior convictions. The prosecutor filed a contrary motion to admit the evidence in the case in chief. Specifically, the prosecutor sought to admit evidence of 10 forgery convictions that occurred between 1982 and 1986, five convictions for passing checks with insufficient funds, four of which occurred in 1982, and one occurred in 2006, and one conviction for obtaining property by false pretenses in 1986. In addition, the prosecutor sought to introduce evidence of 22 incidents of uncharged conduct in 2004 in which defendant passed checks with insufficient funds.

Defendant, argued against the prosecutor's in limine motion, asserting the evidence should be excluded because it was prejudicial. The court granted the prosecutor's motion. In addition, the court granted the prosecutor's request to take judicial notice of the convictions, including 10 counts of forgery and four counts of passing checks with insufficient funds.

Upon taking judicial notice and admitting the evidence, the court instructed the jury that the convictions could be used in this case to decide whether defendant acted with intent to defraud, knew there were insufficient funds to cover the checks he wrote, and that defendant did not act out of mistake or accident.

Analysis

Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition. (Evid. Code, § 1101, subd. (a).) However, evidence of an uncharged crime is admissible to prove disputed, material fact—such as motive, opportunity, intent, preparation, *common plan or scheme*, *knowledge*, *identity*, absence of mistake or accident—other than a disposition to commit such a crime. (Evid. Code, §1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) To be

admissible, however, uncharged misconduct must be sufficiently similar to the charged offense to support a rational inference concerning a material fact other than criminal disposition. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) "The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756, italics in *Thornton*, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

The degree of similarity that is necessary to establish relevance varies depending upon the type of fact it is being offered to prove. "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) The uncharged crimes must be "highly similar" to the charged offenses (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123, that is, the two incidents must display a " 'pattern and characteristics . . . so unusual and distinctive as to be like a signature.' " (*Ewoldt, supra,* 7 Cal.4th at p. 403.) "To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent." (*People v. Lenart, supra,* 32 Cal.4th at p. 1123.)

On appeal, the trial court's determination of admissibility under Evidence Code section 1101, subdivision (b), being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168.)

Here, the evidence of the prior acts was admitted to show intent and absence of mistake under Evidence Code section 1101, subdivision (b). The *Ewoldt* court explained the standards for admissibility of evidence to prove intent as follows: "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with

each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

In this appeal, defendant asserts the admission of the evidence was error, because the jury did not hear evidence that the conduct underlying the convictions was similar to the conduct charged in this case; rather, the jury was only made aware of the existence or the prior conduct. Therefore, the jury was unable to conclude that defendant's intent in committing the priors was the same as his intent in the present case.

While the jury did not hear evidence of the specifics surrounding the prior convictions, it was made aware of the number of the prior convictions, and what crimes defendant had committed. Here, the fact of the prior convictions for passing bad checks was sufficiently similar that the jury could conclude that defendant harbored the same intent in both instances to defraud a check payee by writing a check on an account with insufficient funds. Defendant's prior crimes of forgery and passing checks with insufficient funds were sufficiently similar "to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

In addition, the fact of the prior convictions was directly relevant to show absence of mistake. Here, defendant's defense at trial that he was a legitimate business person whose disorganization was the cause of his passing bad checks was directly contradicted by his prior convictions for writing multiple checks to the same retailer on an account with insufficient funds. Because of the similarity between the prior convictions and the

current charges, evidence of the prior incidents was probative of defendant's intent to commit check fraud and his absence of a mistake in the present case.

Considered in light of its probative value to prove intent and absence of mistake, evidence of prior acts of forgery and passing bad checks was relevant and not unduly prejudicial under Evidence Code section 352. The trial court's decision to admit the evidence did not "fall[] outside the bounds of reason," such that it must be reversed on appeal. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

The trial court did not err in admitting evidence of the prior acts of passing bad checks and forgery under Evidence Code section 1101, subdivision (b). The evidence is admissible to demonstrate both intent and absence of mistake, and is more probative than prejudicial under Evidence Code section 352.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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DUFFY, J.